

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

KEITH ABSHEAR,

Petitioner,

-vs-

Case No. 3-:05-CV-258

ERNIE MOORE, Warden,

District Judge Thomas M. Rose

Respondent.

Chief Magistrate Judge Michael R. Merz

**ENTRY AND ORDER OVERRULING THE WARDEN'S OBJECTIONS
(Doc. #36) TO CHIEF MAGISTRATE JUDGE MICHAEL R. MERZ'S
REPORT AND RECOMMENDATIONS (Doc. #32) REGARDING A
CERTIFICATE OF APPEALABILITY; ADOPTING CHIEF
MAGISTRATE JUDGE MERZ'S REPORT AND RECOMMENDATIONS
REGARDING A CERTIFICATE OF APPEALABILITY IN ITS
ENTIRETY AND TERMINATING THIS CASE**

This matter is before the Court pursuant to Respondent Ernie Moore's (the "Warden's") Objections to the Report and Recommendations of Chief Magistrate Judge Michael R. Merz regarding Petitioner Keith Abshear's ("Abshear's") Motion for Certificate of Appealability. (Doc. #36.) Abshear's Motion for Certificate of Appealability (doc. #29) was filed on March 31, 2008. To this the Warden did not respond. Chief Magistrate Judge Merz then issued the Report and Recommendations on April 25, 2008. The Warden has now objected (doc. #36) and Abshear has replied to the Warden's objection (doc. #37.)

Chief Magistrate Judge Merz recommends that Abshear be granted a certificate of appealability on eight (8) specifically identified issues. Chief Magistrate Judge Merz did not perform an independent analysis of whether his conclusions that are being appealed are

debatable among reasonable jurists because he himself initially made the conclusions. Without objections from the Warden, Chief Magistrate Judge Merz could not make a reasonable determination as to whether his conclusions were reasonably debatable. Obviously, making an analysis of whether one's own conclusions are reasonably debatable without argument otherwise puts one in a untenable position of having to decide if one's decision, presumably made with careful consideration and study, is a good decision. Not only is this illogical, but, as Chief Magistrate Judge Merz said, is "would take the process too far outside the ordinary adversary process."

The Warden indicates that he objects to Chief Magistrate Judge Merz's recommendation to certify all requested issues but offers no additional support for this argument. The Warden argues that the Court is required to perform an independent analysis. However, given at least two opportunities, the Warden has offered no argument with which or against which an analysis could be performed. The Warden also argues that Chief Magistrate Judge Merz recommends a blanket certificate of appealability. However, Chief Magistrate Judge Merz sets forth each and every issue upon which he is recommending a certificate of appealability.

As required by 28 U.S.C. §636(b) and Federal Rules of Civil Procedure Rule 72(b), the District Judge has made a de novo review of the record in this case. Upon said review, the Court finds that the Warden's objections to the Chief Magistrate Judge's Report and Recommendations are not well-taken, and they are hereby OVERRULED. The Chief Magistrate Judge's Report and Recommendations is ADOPTED in its entirety. Abshear is granted a Certificate of Appealability on the eight (8) issues specifically identified in Chief Magistrate Judge Merz's Report and

Recommendations. The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

DONE and **ORDERED** in Dayton, Ohio, this First day of July, 2008.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record